IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1475 OF 2003

Ratan @ Vishvajit Manoranjan Bose,
Age about 30 years, residing at
146, Shastri Nagar, Infront of
M.I.G.Colony Post Office,
Bandra(E), Mumbai-400051. ..Appellant/
Org.Accused.

V/s.

The State of Maharashtra
At the instance of Kherwadi
Police Station C.R.No.231/96. ..Respondent.

Mr. Girish Kulkarni with Mr. Ram Makhija, Advocates for Appellant.

Mr.K.V.Saste, APP for Respondent-State.

CORAM: A.M.KHANWILKAR,J

DATE : SEPTEMBER 8, 2006.

JUDGMENT :

1. This appeal takes exception to the Judgment and Order passed by the Additional Sessions Judge, Greater Bombay dated November 21, 2003, in Sessions Case No. 245 of 1997. The appellant/accused was chargesheeted and tried for offence under section 366 and 376 of I.P.Code. It was alleged that on 13th September, 1996, at about 18.00 hours, the appellant abducted a minor girl Kum. Geeta Mahadeo Sharma, aged about 14 years, in order that she may be seduced to illicit intercourse with him, and thereby

committed an offence punishable under section 366 of I.P.Code; and in the course of same transaction, on the aforesaid date, time, on the mezzanine floor of 146, Shastri Nagar, Opposite M.I.G.Colony Post Office, Kherwadi, Bandra(East), Mumbai - 400 051, committed forcible sexual intercourse (rape) on the said minor girl, thereby committed offence under section 376 of I.P.Code. During the trial the appellant/accused was additionally charged for offence under section 363 of I.P.Code on the allegation that he took or enticed the said minor girl from the lawful guardianship of her parents without their consent.

2. The prosecution examined P.W.1-Mahadeo Rupu Sharma, father of Kum. Geeta M. Sharma, P.W.2-Prosecutrix, P.W.3-Monohar Kushaba Gawari (Investigating Officer), P.W.4 Mrs.Shubhada Sanjiv Khandeparkar, Assistant doctor in Gynaech Department of Bhabha Hospital, where Kum. Geeta was admitted for treatment after the incident. The trial court after analysing the prosecution evidence on record, recorded finding of guilt against the appellant for each of the offence, for which charge was framed against him.

3. The trial Court in the first place found that Kum. Geeta Sharma, prosecutrix was below the age of 16 years at the relevant time. It is further found that the prosecution has proved that the appellant/accused on 13th September, 1996 at about 18.00 hours took away and enticed the said minor Geeta Sharma from the lawful guardianship of her parents without her consent. The trial Court has further found that the prosecution has also proved that the appellant/accused on the same date, time and place of incident abducted the said minor Geeta Sharma in order that she may be seduced to illicit intercourse with him. The trial court has further found that the prosecution has also proved that the appellant/accused in the course of the same transaction, committed forcible sexual intercourse(rape) on the said minor Geeta.

4. Although the prosecutrix resiled from her stand during the cross-examination, for which, she was required to be declared hostile, the trial Court proceeded to accept her version to the extent it supported the prosecution case. The trial Court also relied on the evidence of P.W.1, father of the prosecutrix, to hold that his version was also trustworthy and can be used to indicate complicity of

the appellant/accused in the commission of the offence. For that matter, the trial Court has also relied on the medical evidence namely Medical reports, as also corroborative evidence given by the P.W.4 Assistant Doctor in Bhabha Hospital. Her evidence has not only been found relevant to establish the fact that the minor Geeta was subjected to forcible sexual intercourse(rape), but also corroborates the version of P.W.1 that on being admitted in hospital she had disclosed the history of rape by her neighbour. In fact, the trial Court has proceeded to hold that there was no challenge by the defence to the prosecution case that minor Geeta was raped. The only point disputed by the defence as is noted by the trial Court was in respect of the involvement of the appellant/accused in the crime. Even this aspect has been elaborately considered by the trial Court by relying on the evidence of (P.W.2) Prosecutrix and (P.W.1) father, as also medical report regarding physical examination of the appellant as well as prosecutrix. Having regard to the version given by the P.W.3, I.O. and the seizure of bloodstained clothes of the prosecutrix as well as of the appellant/accused, particularly from the accused clearly establishes complicity of the appellant/accused in commission of the crime. The

Court has noted that the appellant did not offer any explanation whatsoever regarding the blood stains found on the clothes worn by him at the relevant-time, which resembles the blood group of the prosecutrix; as well as the finding of the antigens of "A" group in the semen found on the nicker of the prosecutrix indicating involvement of the appellant. Taking totality of the prosecution evidence on record, the trial Court found the appellant guilty of the alleged offence and passed following order:

"**FINAL ORDER**

1. The accused Ratan @ Vishvajit Manoranjan Bose is found guilty for the offence punishable under section 363 of I.P.C. He is sentenced to suffer R.I. for 4(four) years and he shall be liable to pay fine of Rs.500/- (Rs.Five hundred). In default of fine, he shall further undergo R.I. for 3(three) months.

2. The accused is found guilty for the offence punishable under section 366 of I.P.C He is sentenced to suffer R.I. for 5(five) years and he shall be liable to pay fine of Rs.1,000/-(Rs.One thousand). In default of fine, he shall undergo R.I. for 6(six) months.

3. The accused is found guilty for the offence punishable under section 376 of I.P.C. He is sentenced to suffer R.I. for 7(seven) years. and he shall be liable to pay fine of Rs.1,000/-(Rs.One thousand). In default of fine, he shall further undergo R.I. for 6(six) months.

4. All the sentences to run concurrently.

5. The accused is entitled for set off u/s 429 of Cri.P.C.

6. The accused is on bail. His bail bond stands cancelled and he is taken into custody immediately.

7. The muddemal Articles 1 to 12 being worthless be destroyed after the appeal period of over."

This decision is subject matter of the challenge in the present appeal.

5. Having marshalled the entire evidence on record with the assistance of the counsel appearing for the parties and juxtaposing the same with the conclusion reached by the trial Court in recording finding of guilt against the appellant, I have no hesitation in taking the view that the conclusion so reached by the trial Court is a possible view. Besides, there is no infirmity in the approach of the trial Court in reaching the conclusion-recording finding of guilt against the appellant. I shall presently elaborate on this matter.

6. The counsel for the appellant would contend that the conclusion reached by the Court below cannot be sustained either in fact or in law. It is submitted that the trial Court ought to have discarded the evidence of P.W.2 prosecutrix. She had

given two different versions on the material facts and her evidence was unreliable one to proceed against the appellant with such a serious charge. To support this proposition reliance was placed on the decision in the case of **Sharnappa Mutyappa Halke V/s.The State of Maharashtra, (AIR 1964 Supreme Court 1357**), particularly exposition in paragraph-10 of the subject Judgment. It is then contended that the age of the prosecutrix (P.W.2) has not been proved by the prosecution. That was the relevant fact to be proved to show that the prosecutrix was below 16 years of age at the relevant time. It is then contended that there is no evidence to corroborate the prosecution case. In fact, the prosecution having failed to examine material witnesses like Shakuntaladevi, mother of prosecutrix and Manisha, wife of the appellant/accused, who were present in the premises at the relevant time, creates serious doubt about the prosecution case. It is submitted that Manisha's evidence was necessary to establish the fact that the appellant was at home on the relevant day. It is then submitted that Shakuntaladevi's evidence was necessary to establish two facts. Firstly, to prove that she went to the mezzanine floor and told the prosecutrix to change her clothes after the incident as the prosecutrix was profusely bleeding and that

thereafter, she took the prosecutrix to the Bhabha Hospital. It is submitted that this witness would have also spoken about the fact that she was the first person to inform the incident to police and her statement was recorded, which ought to have been treated as FIR; whereas the FIR is registered not on the basis of her statement, but other prosecution witness. This raises doubt about the contents of the complaint lodged with the police. In the first instance, contends learned Counsel, it would support the argument of the appellant that the prosecution has changed the story subsequently. It is then submitted that recovery of clothes from the premises, where the accused was staying and the incident had happened has not been proved, as the panchas have not been examined. Reliance is placed on the decision of the Apex Court in the case of **Kailash Potlia V/s. State of A.P.(1995 Supreme Court Cases (Cri) 985)** to contend that seizure of clothes belonging to accused will be of no avail. Even if seizure of clothes belonging to appellant is held to be proved, that evidence is of no avail to establish the involvement of the appellant in the commission of the crime. Emphasis was placed on the observation made in paragraph-4 of this decision that the prosecution had failed to examine other panch witness to corroborate

the evidence of P.W.22. In that case, for which reason the Apex Court noted that it was difficult to accept the uncorroborated sole testimony of P.W.22 to believe the recoveries said to have been made. It is then submitted that the specific case of the prosecution was that after the incident when the prosecutrix was admitted in hospital she was bleeding profusely. However, the medical evidence does not support that version, which raises doubt about the prosecution case. On the above submission counsel for the appellant would contend that the prosecution case should fail as against the appellant, having failed to prove by clinching evidence beyond any reasonable doubt about the involvement of the appellant in the commission of the crime. It was submitted that even if the prosecution evidence was to be accepted as it is, it would only raise suspicion about the participation of the appellant in the alleged crime, but that was not enough to record finding of guilt and the appellant would be entitled to benefit of doubt.

7. The prosecution case is that the prosecutrix Kum.Geeta Sharma (P.W.2) was residing with her brothers, sisters and parents at 143, Shastri Nagar, Bandra(East), Mumbai 400051; adjacent to the house

of the prosecutrix is the house of one Mr. Namdeo Gadkari. The appellant/accused is the Son in law of said Mr. Gadkari. These facts are not disputed. It has also come on record that the house of the prosecutrix as well as said Mr. Gadkari consists of ground floor and mezzanine floor. The structure of both the houses is similar. It has also come in the evidence that there is one window connecting mezzanine floor of the house of the prosecutrix and that of Mr. Gadkari. The location of the two houses is deposed to by the prosecutrix(P.W.2), father of the prosecutrix(P.W.1), as well as I.O.(P.W.3). Besides, the oral evidence, this fact is corroborated by the spot panchanama. It is established from the record that the said Namdeo Gadkari was residing with his wife, son, daughter Manisha and her husband-appellant/accused. This fact is deposed to by P.W.2, which has gone unchallenged. It has also come in the evidence that the incident occurred on 13th September, 1996. It was one of the days of Ganpati festival. On that day, Namdeo Gadkari, his wife and son had gone to Goa for Ganpati Festival. The appellant and his wife Manisha were present in the house. This fact is deposed to by P.W.2. Even this version has gone unchallenged. In fact, the appellant/accused has admitted this version, as can

be noted from his version given in response to question No.10 put to him in his statement under section 313 of Cr.P.Code. The question No.10 as posed to him was :

> "P.W.2 has further stated that on 13/09/1996 it was one of the days of Ganpati Festival, on that day Namdeo Gadkari, his wife and son had gone to Goa for Ganpati Festival, Manisha and you accd. were in the house. What do you want to say ?"

To this question the appellant/acused answered in the affirmative. He has stated "Yes. It is correct."

. We shall now turn to the other events alleged by the prosecution. It is alleged that at about 6 p.m. mother of the prosecutrix asked her to put wet clothes on the rope for drying purpose on the mezzanine floor. It is her(P.W.2) case that she went to the mezzanine floor and after placing the wet clothes on the rope for drying, she lied down on the cot kept on the mezzanine floor. At that time, the accused opened the big window which connected both the mezzanine floors of the two houses. The accused then entered the mezzanine floor of the prosecutrix’s

house and invited the prosecutrix for watching colour T.V. in his house. The prosecutrix refused to go with him. At that time, the accused pressed the mouth of the prosecutrix and dragged her to the mezzanine floor of his house. Here it may be noted that the appellant was a fully grown up man having good physic and the prosecutrix is a minor girl. The physic of the prosecutrix can be discerned from the medical evidence. Be that as it may, the accused then removed the nicker of the prosecutrix and committed forcible sexual intercourse with her. The prosecutrix thereafter, returned to the mezzanine floor of her house and called her mother, who was on the ground floor of the house. She immediately disclosed the incident to her mother. The mother of Kum. Geeta viz. Smt.Shakuntaladevi Mahadeo Sharma saw the blood stains on the clothes of the prosecutrix and therefore, asked her to change her clothes. Thereafter, Shakuntaladevi, mother of the prosecutrix, took the prosecutrix Geeta immediately to Bhabha Hospital for medical treatment as prosecutrix was profusely bleeding from the private part. Geeta was admitted in Bhabha Hospital.

8. The prosecution would rely on the evidence of P.W.2. She has also given the description of the

house. She stated that one can pass through the mezzanine floor of her house to the mezzanine floor of the house of Mr.Gadkari. She has stated that on 13th September, 1996, Manisha, wife of appellant/accused and the appellant/accused were in the house. She has spoken about the fact that her mother told her to put the wet clothes on the rope for drying purpose on the mezzanine floor. Accordingly, prosecutrix went to the mezzanine floor and after putting wet clothes on the rope, laid down on the cot kept on the mezzanine floor of her house. She has also spoken that lights were not on at the relevant time. She has then deposed that somebody called her to the mezzanine floor of Mr. Gadkari. She has stated that she could not see the face of that person due to darkness. But then she has clearly stated that she could identify the voice of that person similar to the voice of the accused. It is relevant to note that the time of incident is stated to be only 6.00 P.M.. It is not as if it was pitch dark. At any rate, P.W.2 has categorically deposed that she recognised the person(accused) on the basis of his voice, which is quite natural thing to happen when dealing with the next door neighbour leaving in such locality. She has then deposed that the appellant then forcibly took her to his mezzanine

floor by pressing her mouth by means of his palm. She has also spoken about the fact that the appellant Ratan asked her to remove nicker and when she refused to do so, the appellant Ratan removed her nicker. He also removed his pant and thereafter, inserted his male organ into her private part. She has also stated that the appellant Ratan committed forcible sexual intercourse on the cot. To discredit this version of P.W.2, it was argued that it was next to impossible to commit such activity on the mezzanine floor which was hardly usable. This argument overlooks that the spot panchanama records the area of Mezzanine floor as 15 ft. x 15 ft. That fact is not challenged by the defence. The cross-examination of P.W.3(I.O) was directed only in respect of the height of the mezzanine floor. That does not take the matter any where for the defence. Firstly because, it is not uncommon in city like Bombay where persons are forced to stay in such houses and are used to carry on their routine activities. Besides, it is in evidence that, cot was kept on both the mezzanine floors, which indicates that the same was in use or was usable. Be that as it may, P.W.2 has then deposed that at the time of incident she was wearing white colour top and blue colour skirt and appellant Ratan was wearing jeans pant. She has then

stated that she went to the mezzanine floor of her house and called her mother to the mezzanine floor and narrated the incident to her mother. She has then stated that her mother called Manisha. She also stated that she was profusely bleeding from her private part, due to which her clothes were stained with blood. She has then stated that her mother gave her other clothes and she changed the clothes. She has then stated that Manisha and Shakuntaladevi, her mother took her to Bhabha Hospital for medical treatment. She has then stated that she was admitted in Bhabha Hospital and was undergoing treatment for a week. She has further stated that during night time on that day police visited the hospital and recorded her complaint. Complaint was shown to this witness P.W.2. She has admitted that it bears her signature. She has also admitted that the contents of the complaint are correct. Complaint was then marked as Exh.7.

9. Before adverting to the contents of the complaint, it will be relevant to notice the evidence of P.W.1. He has stated that he was informed that there was some problem at his house when he was away in his cutting saloon. That message was given to him at about 7 p.m. on telephone call by one

Kedarprasad, who is also resident of the same locality. On receiving that message, P.W.1 rushed to his house and reached at about 8 p.m. when his younger daughter told him that Geeta has been admitted in Bhabha Hospital. He has stated that he straightway proceeded to hospital. To this extent, the version of P.W.1 is unshaken. It is then stated by P.W.1 that after about two hours he alongwith his wife Shakuntaladevi and Kedarprasad proceeded to Kherwadi Police station. He has then stated that police recorded his statement. On this fact in the cross-examination, P.W.1 has been questioned in paragraph-9 of his cross-examination. He has stated that he himself did not lodge the complaint against the accused in the police station. The fact that the statement came to be recorded by the police is not challenged. From the examination-in-chief of this witness, it is not clear as to whether he is referring to recording of statement before registration of the FIR or later on. I shall advert to the relevance of this position a little later. From his evidence, it is certain that the local police was duly informed about the occurrence.

10. Evidence of P.W.3, Investigating Officer would indicate that on 13th September, 1996 when he

was on station house duty from 8 p.m. to 8 a.m. Shankuntaladevi, mother of prosecutrix attended the police station at about 10 p.m.. This time corresponds with the time mentioned by P.W.1 about his visit to the police station alongwith his wife Shakuntaladevi. P.W.3 has further deposed that said Shakuntaladevi stated that her neighbour had committed rape on her daughter. She also informed that her daughter was admitted in Bhabha Hospital. P.W.3 has stated that he immediately made entry in the station diary and left the police station with P.I. Sonawane, the police staff and Shakuntaladevi. They proceeded to Bhabha Hospital. He has stated that he visited the ward where the prosecutrix was admitted and recorded her statement as per her version. He has stated that complaint was given by prosecutrix in Hindi language. He wrote down the same in marathi language and explained the same in Hindi language. He has stated that prosecutrix found the version noted in the complaint as correct, Whereafter P.W.3 obtained the signature of prosecutrix(P.W.2).

11. True it is that the fact of occurrence was first reported by Shakuntaladevi, but the FIR has been registered on the night between 13/9/1996 and

14/9/1996 at about 2.45 a.m.. FIR (Exh.7) is recorded on the basis of statement given by the prosecutrix herself to the police. In this statement she has mentioned about the circumstances in which she went to the mezzanine floor, as is stated in her deposition. She has also stated that after putting the wet clothes on the rope she was sitting on the cot in the mezzanine floor in her house watching T.V.. She has stated that at that time Ratan @ Vishvajit Manoranjan Bose, appellant herein entered mezzanine floor of her house by opening the door which seperated the mezzanine floor of the two houses. He invited prosecutrix to come to his house to watch colour T.V. but the prosecutrix refused to do so. At that time, the appellant pressed her mouth and forcibly took her to the mezzanine floor of his house. She has also stated about the other details that appellant/accused asked her to remove her nicker and as she refused to do so, he himself removed it forcibly and committed forcible sexual intercourse. She has also described the clothes which were worn by her at the relevant time. The version given by Prosecutrix(P.W.2) on oath is consistent with the statement given to the police on the basis of which FIR came to be recorded.

12. Prosecution case is corroborated by the medical evidence. When the prosecutrix was admitted in the hospital for treatment it is seen that she was reluctant to disclose that she has been raped by her neighbour. However, on persistent enquiries made by the hospital staff later on prosecutrix gave history of the alleged rape "by her neighbour". This fact is supported by the hospital record as also medical examination certificate Exh.18. History has been mentioned as alleged history of being raped on the prosecutrix on 13.9.1996 around 6 p.m.. given by the victim in her own words. Evidence of P.W.4 Dr.Mrs.Khandeparkar clearly points out that the patient (prosecutrix) was admitted in the hospital and was treated on account of injury caused due to forcible sexual intercourse committed on her. P.W.4 has also disclosed that the patient on repeated enquiries gave history of alleged rape by her neighbour. That the incident happened when the patient/prosecutrix had gone to the terrace(read mezzanine floor) to dry clothes when her neighbour jumped from the window of the terrace (mezzanine floor) and raped her. P.W.4 medical officer has also stated that patient also disclosed that her mouth was gagged and by force her neighbour committed rape on her. The fact that patient(prosecutrix) was subject

to forcible sexual intercourse was evident from the examination of the private part of the prosecutrix. It is relevant to reproduce the opinion of the medical officer as stated in paragraph-9 and 10 of the examination in chief which reads thus:

> "9. On examination of the private part, I found that the labia majora was slightly hypertrophied i.e. swollen. The hymen was torn, admitted one finger easily and two fingers painfully. I noticed a fresh small tear at 6.00 O'clock position. It was half cm. in length at fourchett. I did not notice active bleeding from the fourchett at the relevant time. I noticed erythema i.e. redness and ecchymoses i.e. bleeding from small capillaries underneath the skin showing the redness. It causes normally due to rubbing or pressure and physical trauma. My Registrar Kalpana Patil made the notes as per my dictation on page no.7 of the indoor case-papers. By saying fresh tear I want to say that it was within twenty-four hours from the examination.
>
> 10. The findings given by me are consistent with the history given by the patient."

There is no serious challenge to this part of the evidence of P.W.4. In the cross-examination case was put to P.W.4 that when the patient was being examined one lady by name Manisha was present, which has been denied by P.W.4. In the cross-examination, P.W.4 has clearly stated that she had allowed only one member from the relations or friends of the patient in ward. She has also emphatically stated that the member from

the prosecutrix family who was present in the ward was her mother and none else. Suggestion was also given to this witness that history of rape was given by one Manisha and not by the victim, which has been denied. Version of P.W.4 who is undoubtedly independent witness clearly supports the prosecution case not only on the fact that Geeta(prosecutrix) was subjected to forcible sexual intercourse and that she is 14 years of age but also history of the rape by neighbour against the wishes of Geeta(prosecutrix) on 13/9/1996 at around 6 p.m..

13. There is yet another strong circumstance, which speaks about the complicity of the appellant/accused in the commission of the crime. It has come in evidence that during the investigation (P.W.3) I.O. had made spot inspection. Spot panchanama has been prepared. The same has been proved by P.W.3. It has noted the place of incident as the mezzanine floor of the neighbours house. P.W.3 has stated that the party who had gone for spot inspection first went to mezzanine floor of the house of Shakuntaladevi. There they went to the bathroom of the house of Shakuntaladevi and took charge of the bloodstained clothes of the prosecutrix. He has given description of the clothes, which were stated

to have been worn by the prosecutrix at the relevant time. The said description corresponds with the description given in the panchanama as well as by prosecutrix(P.W.2). The clothes belonging to prosecutrix have been identified. P.W.3 Investigating Officer further deposed that they then went to mezzanine floor of the neighbour house namely Namdeo Gadkari through the window which was connecting both the mezzanine floors. There was bedsheet on the cot. The charge of said bedsheet was taken. There was bloodstains on that bedsheet. He has stated that at that time, Manisha was present in the house. He has proved panchanama, which has been exhibited as Exh.9. Blood-stained bedsheet, which was recovered from mezzanine floor of the house of Gadkari is also identified. Articles so recovered were forwarded for chemical analysis.

14. P.W.3 has also deposed that on 14th September, 1996 at about 8.30 a.m. he had arrested the accused. He took charge of the clothes under panchnama in the presence of panchas. The clothes were blue colour T-shirt, dark blue jean pant and half pant. The said panchanama has been proved and exhibited as Exh.10. It is seen that on the half pant as well as jeans pant blood stains were noticed.

P.W.3 has identified clothes belonging to the appellant/ accused. Even the clothes belonging to accused which contained bloodstains were sent for chemical analysis. The chemical analysis report has been exhibited as Exh. 14 and 15 collectively. There is absolutely no cross-examination on the search and seizure of clothes belonging to the appellant/accused, on which bloodstains were found. Chemical analyser's report indicates that the blood stains found on the clothes worn by the appellant/accused at the relevant time resemble the blood group of prosecutrix. i.e. blood of O-Group and blood mixed semen of A and O antigens semen was found. The bedsheet taken charge from the place of incident i.e. mezzanine floor of appellant on which blood of group-O as well as human semen was found. The blood group of accused is of A-group. The trial Court has also adverted to this circumstance as a strong circumstance indicating complicity of the appellant as finding of antigens of A-group human semen found on the nicker of the prosecutrix, shows involvement of the appellant. The incident has occurred in the house where the appellant resided and was available on that day. The appellant has failed to offer any explanation about blood stains on the bedsheet recovered from the house where he was

staying, where the incident had happened; as well as on the clothes worn by him at the relevant time.

15. During the course of argument, my attention was invited to the panchanama under which clothes belonging to the appellant accused were seized. Description of the jeans pant has been given as black and not dark blue. However, as mentioned earlier there is absolutely no cross-examination on the material aspect to doubt the credibility of the seizure of the blood stained clothes belonging to the appellant. The trial court has taken totality of the evidence on record and has noted that the defence has not seriously challenged the incident of rape. However, the only point disputed by the defence was in respect of involvement of the accused in the crime. Relevant materials to indicate complicity of the appellant/accused have been considered by the trial Court from paragraph 37 onwards. Indeed, the trial Court has made certain observations such as because of Ganpati festival there was lightening in the area which light would have been sufficient to facilitate the prosecutrix to identify culprit. The observations such as this which are not supported by the evidence on record even if ignored, it is not possible for this court to reach at the different

conclusion than the one arrived at by the trial court to record finding of guilt against the appellant for having committed alleged crime. Totality of the evidence, if taken into account leaves no manner of doubt about the involvement of the appellant in the commission of the crime. Suffice it to observe that some unwarranted observations made by the trial court in the impugned Judgment cannot be the basis to set aside the final conclusion reached by the trial Court of finding of guilt in the fact situation of the present case. There is clinching material on record to establish complicity of the appellant in the commission of the crime. I am in agreement with the opinion recorded by the trial court that the only point disputed by the defence is in respect of involvement of the appellant in the crime. That aspect will have to be answered against the appellant, as there is overwhelming material to indicate his complicity in the commission of the crime. In my opinion, this is not a matter that would warrant interference or to accept the argument canvassed on behalf of the appellant that the appellant should be given benefit of doubt.

16. The argument of the appellant that the entire evidence of P.W.2 prosecutrix, should be discarded as

she has given two contradictory versions, does not commend to me. The Court below has justly noted the fact that the prosecutrix had supported the case of prosecution in the examination in chief. Her version corroborates with the contents of her statement given to the police. The court has then noted that it had observed the tenor of witness P.W.2, she deposed naturally prior to the recess period. However, she resiled from her stand taken in the examination in chief in the cross-examination-which commenced after the lunch break-from which it was far too obvious that some development had taken place during the court interval. The Court below has then noted that considering circumstantial evidence such as panchanama of the place of evidence, seizure of clothes, CA report, version of the prosecutrix in the examination in-chief can be relied upon. In the examination in chief the prosecutrix in clear terms has stated that it was the appellant accused who dragged her from the mezzanine floor of her house to the mezzanine floor of his house through the window connecting both the houses and committed forcible sexual intercourse with her. Version given by the prosecutrix in her examination in chief is supported by the documentary record maintained in the hospital where the history of the case has been given in the

words of the prosecutrix herself as well as statement given by her to the police (Exh.7). The prosecutrix has been declared as hostile witness and was allowed to be cross-examined by the Public Prosecutor. In my opinion, no fault can be found with the approach of the trial Court in sifting the evidence of prosecutrix (P.W.2) and to accept only such part of the evidence which was reliable and trustworthy and corroborated by the other prosecution evidence. That is permissible. Counsel for the appellant however, relied on the decision in the case of **Sharnappa Mutyappa Halke(supra).** In that case, the witnesses had given evidence at the trial under section 288 of the old Criminal Procedure Code. The Court has noted that where a person has made two contradictory statements on oath, it is plainly unsafe to rely implicitly on his evidence. It is further observed that before one decides to accept the evidence brought in under section 288 of the Code of Criminal Procedure(old) as true and reliable, one has to be satisfied that this is really so. It is then stated that the satisfaction can be reached in most cases only if there is such support in extrinsic evidence as to give a reasonable indication that not only what is said about the occurrence in general but also what is said against the particular accused sought to be

implicated in the crime is true. In the present case, there is extrinsic evidence to give reasonable indication that not only what is stated about the occurrence in general but also the appellant who has been implicated in the crime is true. I have already discussed the nature of evidence which indicates the complicity of the appellant in the commission of the crime. Counsel for the appellant would then rely on the decision in the case of **Kailash Potlia(supra).** Reliance was placed on observation made in paragraph-4 of this decision. Relying on the said observations it was contended that the prosecution should fail as panch witnesses were not examined. In other words, it was submitted that the panchanama of seizure of clothes belonging to the appellants will have to be discarded. It is well established that merely because panch witnesses is not examined, panchanama if otherwise proved in evidence by prosecution witness such as Investigating Officer, can be looked into. In the present case, there is absolutely no challenge to the evidence of P.W.3 in so far as contents of the seizure panchanama is concerned. In other words, the prosecution evidence with regard to the seizure of bloodstained clothes belonging to the appellant has remained unchallenged and unshaken. Suffice it to observe that as there

was extrinsic evidence available in the present case to indicate complicity of the appellant in the commission of the crime, even if the P.W.2 resiled by giving contradictory version on oath for which she has been declared hostile, her entire evidence cannot be discarded. Her version to the extent it is reliable can be looked into alongwith other evidence and circumstances.

17. It was next contended that the prosecution has failed to prove the age of the prosecutrix. In my opinion, this argument is wholly misplaced. The prosecution through evidence of P.W.3 has produced birth certificate of prosecutrix Geeta, issued by the Bombay Municipal Corporation (Exh. 12). That indicates the date of birth of the prosecutrix as 12.12.1981. That means on the date of incident the prosecutrix was below 16 years. There is absolutely no cross-examination or challenge to the evidence regarding the age of the prosecutrix. In as much as, P.W.1 in his examination in chief in paragraph-1 has clearly stated that Geeta was his eldest child aged about 14 years. This fact has not been challenged in the cross-examination at all. Moreover, the medical evidence also supports the prosecution case that the prosecutrix was below 16 years of age on the relevant

date. Interestingly, before the lower Court also the only point disputed by the defence is in respect of the involvement of the appellant/accused in the crime. The appellant would therefore succeed only if this fact was to be answered in favour of the appellant. On that aspect I am in agreement with the lower Court that the prosecution has established the involvement of the accused in the commission of the crime.

18. It was next argued that the prosecution has failed to examine Shakuntaladevi and Manisha, which was fatal. Their evidence was material evidence. In as much as, Shakuntaladevi would have proved that she was in the house at the relevant time and could be cross-examined on other matters to belie the prosecution case of involvement of the appellant. Besides, she is one who facilitated changing of blood stained clothes of the prosecutrix immediately after the incident and also took her to the hospital. She had given statement before the Police which ought to have been treated as FIR. This argument is devoid of merits. Non-examination of Shakuntaladevi would not change the material fact which are already established in the evidence of the prosecution witnesses. The grievance made that Shakuntaladevi’s

statement should have been treated as first information report is devoid of merits. This is so because P.W.3 in his evidence has clearly deposed that Shakuntaladevi attended the police station at about 10 p.m. or so and informed about the occurrence and that her daughter was admitted in Bhabha hospital. Station diary entry was immediately recorded. The police party alongwith Shakuntaladevi immediately then proceeded to Bhabha hospital where the statement of prosecutrix came to be recorded, which was treated as complaint(Exh.7). In the circumstances, the appellant has not succeeded in persuading this court that there was any inconsistency in the prosecution case and of such nature that it was imperative to give benefit of doubt to the appellant. Similarly, argument of the appellant that non-examination of Manisha, wife of the appellant, was fatal, is of no avail. According to the appellant, Manisha,wife of the appellant, could have proved that the appellant was or was not in the house at the relevant time. In the first place, this argument is not available to the appellant as he himself in his statement under sections 313 of Cr.P.Code admitted that on the relevant date, he was present in the house alongwith Manisha. Besides, nothing prevented the appellant to

examine Manisha himself. For, the relevance of her evidence would atbest indicate that accused was not in the house at that time, which is his defence. It cannot be overlooked that Manisha is the wife of the appellant. In such case, non-examination of Manisha by the prosecution also is of no avail to the appellant.

19. It was then contended that the seizure of the clothes belonging to the appellant will have to be discarded, as the panchas were not examined. I have already dealt with this aspect in the earlier part of the Judgment. Non-examination of the panch witness will not weaken the prosecution case. In fact, in the version given by the Investigating Officer, seizure panchanama has been proved by the Investigating officer(P.W.3). There is no challenge to the said evidence in the cross-examination of P.W.3 at all. Non-examination of the panchas therefore, will not affect the credibility of the prosecution case.

20. It is then submitted that medical evidence belies the prosecution theory that prosecutrix was bleeding profusely. Assuming that the appellant may succeed in pointing out that prosecutrix was not

bleeding profusely, that does not weaken the prosecution case in any manner that prosecutrix was subjected to forcible sexual intercourse at the hand of the appellant.

21. On taking overall view of the matter, in my opinion, this appeal is devoid of merits and the same therefore, deserves to be dismissed. Accordingly, the appeal is dismissed.